

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

In re:

Adversary Case No. 17-01075-TWD

KIM C. KERRIGAN,

Debtor.

KIM C. KERRIGAN,

Plaintiff,

v.

BAYVIEW LOAN SERVICING, LLC, M&T
BANK, and FEDERAL HOME LOAN
MORTGAGE CORPORATION,

Defendants.

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO DISMISS**

I. INTRODUCTION

Debtor Kim Kerrigan concedes one fact, and that fact is dispositive of the present motion: her first lawsuit against Bayview, now pending before the Ninth Circuit, sought to void the same deed of trust that this litigation seeks to void. For this reason the present adversary action is barred two-fold: (1) on account of the claim preclusion arm of *res judicata*; and (2) because the Ninth Circuit has exclusive jurisdiction of the issues of enforceability of the deed of trust, squarely to be decided in the present appeal.

1 While irrelevant for this motion given the foregoing, it should also be noted that Debtor
2 only further sinks her ship when attempting to construct some shred of something in this
3 complaint that could be timely brought. In her opposition, motion for leave to amend, and
4 related declaration she concedes that the actions at issue here took place *in 2007*. There is no ten
5 year statute of limitations for any applicable state or federal claim.

6 This claim never should have been brought, and must be dismissed.

7 **II. DISCUSSION**

8 Debtor should have brought any claims to void the deed of trust in her prior suit, and her
9 failure to do so now means she cannot—for reasons of claim preclusion and because that ruling
10 is on appeal. Debtor’s authority does not change the result, as none of it deals with the
11 circumstances at bar. Indeed, Debtor’s seminal case draws a distinction between the inapplicable
12 scenario there and the analogous one here—and explicitly affirms Bayview’s position in doing
13 so.
14

15 **A. This Second Complaint is Barred by Claim Preclusion, as Debtor’s Own Authority Illustrates.**

16 Debtor does not argue that this subject matter was, and easily could have been, presented
17 in the other action. Nor does Debtor deny that a final adjudication of those rights was reached
18 adverse to her. This means the present case is barred pursuant to authority never even *mentioned*
19 by Debtor. “The doctrine of res judicata operates to bar all grounds for recovery which could
20 have been asserted, whether they were or not, in a prior suit between the same parties (or their
21 privies) on the same cause of action...” *Ross v. Int’l Bhd. of Elec. Workers*, 634 F.2d 453, 457
22 (9th Cir. 1980). In other words, if the plaintiff “had a fair opportunity to litigate that claim
23 before a competent court prior to bringing it to the court below” it is barred. *Id.* at 458.
24
25
26
27
28

1 Instead Debtor breaks down purported “causes of action,” though none actually create a
2 right of action other than TILA,¹ but her argument with respect to all is the same—unity of
3 parties is absent because this action is brought by Kerrigan as a debtor-in-possession as opposed
4 to an individual.² But that distinction finds no support in the case authority cited by Debtor, or
5 any case authority for that matter.

6 Debtor cites just one case in support of her novel position, and it deals with *judicial*
7 *estoppel*, not claim preclusion. Indeed, the court explains in detail why claim preclusion *does*
8 *apply* to debtor and debtor-in-possession cases, citing Ninth Circuit precedent:

9 Because he had asserted defenses that belonged as much to the
10 debtor in possession as to the debtor individually, he was obliged
11 to bring all claims arising out of the same ‘transaction’ per
12 Restatement (2d) of Judgments § 24 or be precluded for having
13 violated the Rule Against Splitting a claim. Thus, the Ninth Circuit
14 held the subsequent abuse of process claim to be precluded under
the doctrine of claim preclusion. *DiSalvo*, 219 F.3d at 1039.

15 It is in this context that one must construe the observation made in
16 *DiSalvo* that, in the concededly different context of contract
17 interpretation, the Supreme Court and the Ninth Circuit had said
that there was no difference between a debtor and a debtor in
possession with respect to being a party to a contract.

18 *Cheng v. K&S Diversified Investments*, 308 B.R. 448, 456 fn. 3 (B.A.P. 9th Cir. 2004). Indeed,
19 the argument here is based on a contract (promissory note) also, and the *Cheng* court teaches that
20 Bayview’s position is correct: **“he was obliged to bring all claims arising out of the same**

22 ¹ Neither the complaint nor the opposition explain *how* the note is to be avoided other than TILA. It is fine to argue
23 “faulty acknowledgement” but there must be some basis in law for arguing that there was a failure and that the court
can fashion a remedy. Notably, that remedy *must not be time-barred*, which is probably why Debtor refuses to
24 explain the theory for the purported claims.

25 ² Debtor also seems to imply the addition of two new defendants in some way impacts the analysis, though fails to
explain how. The other two defendants are the bank Bayview is servicing the loan for (M&T Bank) and “Freddie
26 Mac,” which Debtor “on information and belief” thinks “may” be the holder of the note Bayview is servicing.
(Complaint, ¶ 3) Setting aside the fact that one defendant against whom claims are asserted—Bayview—is
27 identical, the only other related defendant is in an agency relationship with Bayview (its “privity” in the language of
the cases). Moreover, if claim preclusion could be frustrated by suing the same defendant, and then adding a new
28 one, the doctrine would *encourage* multiple litigation, not *prevent* it. Better to sue one defendant; if you win, you
collect; if you lose, sue them again on a new theory and just add someone else. There is no authority for this
position, which is likely why Debtor does not meaningfully forward it.

1 **"transaction" ... or be precluded** for having violated the Rule Against Splitting a claim.” *Id.*
2 That is this case, and Debtor is precluded from splitting her claim by bringing it again in this
3 court. Both the Debtor and the debtor-in-possession³ have/had the same contractual arguments
4 they are asserting now, and could (and should) have brought them all in one action instead of
5 impermissibly splitting the claim once they lost the first iteration.

6 **B. The Issues Present Here are Before The Ninth Circuit, Rendering Inconsistent**
7 **Decisions More Than Theoretical.**

8 Nowhere in Debtor’s opposition does she refute the authority that this court lacks
9 jurisdiction over the “subject matter” of any matter pending before the Ninth Circuit. Nowhere
10 in Debtor’s opposition does she refute that the district court action sought to void the very same
11 note this action seeks to void. Nowhere in Debtor’s opposition does she refute that the
12 enforceability of the note was decided against her, and is currently pending before the Ninth
13 Circuit court of appeal. Nowhere in the opposition does Debtor explain how this court
14 determining the note is voidable could possibly be reconciled with the Ninth Circuit deciding
15 that it was not void (or vice versa). Nowhere in the opposition does Debtor provide the court
16 with even *one* case permitting this highly unusual attempt to litigate the same subject matter in a
17 lower court while pending on appeal. This record leaves the result incontrovertible—this court
18 must dismiss the adversary action because its subject matter is on appeal.

19 **C. Nothing in the Complaint, the Declaration, or Motion for Leave to Amend States a**
20 **Timely Cause of Action.**

21 Debtor’s claims are time-barred, by years. Debtor’s argument that she need not assert a
22 TILA cause of action based on *Hinrichsen* may or may not be true, but is meaningless for
23 purposes of this motion; the *Hinrichsen* court pointed out that the plaintiff in that case was not
24 asserting a TILA claim, but here *Debtor is asserting a TILA claim* for “fees,” “finance and other
25 charges.” If she doesn’t need to assert a TILA claim, then the complaint should be dismissed as
26

27 ³ The fact that Debtor, as debtor-in-possession, has certain rights to avoid transfers does nothing to the inquiry—
28 there still must be a basis to avoid, and here there is none. Plenary powers are meaningless without justification for avoidance. *Cohen* did not involve the debtor-in-possession trying to avoid after doing it a few months prior as debtor.

1 lacking a case or controversy. If she does, then she must do so within the statute of limitations.
2 Her argument that if she has purportedly rescinded it thereby renders any subsequent action
3 timely is absurd—the argument would render the statute of limitations for TILA superfluous.

4 The merits of her purported TILA claim are less than dubious, but need not be addressed
5 in the context of this motion given the dispositive arguments presented. The claim is untimely
6 (like FDCPA, which appears to be dismissed, and any other potential claim), if the court could
7 somehow avoid both the claim preclusion and jurisdictional bars.

8 **III. CONCLUSION**

9 Debtor is trying to void her deed of trust a second time after failing a few months ago.
10 Her purported rationale for doing so—to use this suit to leverage concessions from her lender—
11 does not change the facts, or the law. Debtor should have advanced all of her arguments related
12 to the note and deed of trust in the last action. Her failure to do prevents her from doing so here,
13 not only because one cannot split a claim, but also because her first try is on appeal.

14 Accordingly, Bayview respectfully requests that its motion to dismiss be granted. Because
15 adding new allegations will not preclude the fact that Debtor *should have* advanced them all in
16 the prior action, nor will it magically grant this court subject matter jurisdiction over the subject
17 matter of this suit, leave to amend should be denied.
18

19
20 DATED this 14th day of July, 2017.

21 By: s/ Gregor A. Hensrude
22 Gregor A. Hensrude, WSBA No. 45918
23 KLINEDINST PC
24 801 Second Ave., Ste. 1110
25 Seattle, WA 98104
26 Tel: (206) 682-7701
27 Email: ghensrude@klinedinstlaw.com
28 Attorneys for Defendants

1 **CERTIFICATE OF SERVICE**

2 I, Sharon K. Hendricks, hereby certify that on the date below, I electronically filed the
3 foregoing with the U.S. Bankruptcy Court, Western District of Washington, using the CM/ECF
4 system, which will send notification of this filing to the following parties of record:

5 ***Attorneys for Plaintiff***

6 Scott E. Stafne
7 STAFNE LAW FIRM
8 239 N. Olympic Ave.
9 Arlington, WA 98223
10 scott@stafnelawfirm.com
pam@stafnelawfirm.com
wwactfilings@aol.com

11 DATED this 14th day of July, 2017, at Seattle, Washington.

12 KLINEDINST PC

13
14 By: s/ Sharon K. Hendricks
Sharon K. Hendricks, Legal Secretary

15
16 17023013v1
17
18
19
20
21
22
23
24
25
26
27
28